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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955

No. 355

LAWRENCE P. BARDIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WESLEY G. HALL
PRENTICE H. MARSHALL
Attorneys for Petitioner

JOHNSTON, THOMPSON, RAYMOND
& MAYER
11 South LaSalle Street
Chicago 3, Illinois

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Lawrence P. Bardin, defendant-appellant below and petitioner here, respectfully petitions this Court to rehear his petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit, and in support of his petition says:

I.

The Evidence of Petitioner's Beginning Net Worth Was Insufficient to Permit Resort to the Net Worth Method of Proof and There Was No Independent Evidence Which Tended to Establish the Crime Directly.

The Government sought to establish petitioner's taxable income for the calendar year 1946 by the net worth method of proof. (Br. in Opp., 4.) Essential to this method was proof sufficient to establish petitioner's opening net worth on January 1, 1946.

The analysis of evidence concerning net worth prepared by the dissenting judge in the Court of Appeals (224 F. 2d at 270, 271) demonstrates that there was a sharp conflict between the government and the petitioner regarding the latter's opening net worth. Of particular significance was the government's failure to include in its statement the $161,697.50 realized by petitioner from grain sales during the last four days of December, 1945.

The Court of Appeals accurately summed up all of the government's proof which tended to establish petitioner's opening net worth, when it said (224 F. 2d 257):

> "He [petitioner] filed no returns prior to 1942. According to income tax returns filed with the Internal Revenue Collector, the defendant and his wife had a total income of $3,861.15 and net income of $2,311.15 for the year 1942. For 1943 they had a total income of $12,067.25, and a net income of $1,602.25. For the next two years, defendant alone reported as follows:

Year	Gross Income	Net Income
1944	$8,314.85	None
1945	8,196.15	$3,873.30

> These figures tend to show that defendant's income during the prior years was insufficient to have enabled

him to save any appreciable amount of money, and thus tend to corroborate the relatively low figure set by the government as defendant's beginning net worth. *Holland* v. *United States, supra,* at 133."

In *United States* v. *Calderon,* 348 U. S. 160, this Court rejected as inadequate evidence identical to that here held adequate by the Court of Appeals. In *Calderon* this Court said (348 U.S. at 165):

> "The only evidence of defendant's fortunes between 1935 and 1946, the first prosecution year, consists of his tax returns for 1944 and 1945 and some meager evidence with regard to his tax returns for 1941, 1942 and 1943. The latter apparently was obtained from the respondent, and, standing uncorroborated cannot serve to corroborate respondent's other admissions. The 1944 and 1945 returns show net taxable income of $4,162 and $7,328 respectively, with gross receipts from the coin machines of $9,266 and $10,302. This sketchy background can hardly give rise to an inference that defendant had no more cash at the starting date than the Government gave him credit for.
>
> "Accordingly, we must search for independent evidence which will tend to establish the crime directly, without resort to the net worth method."

It is, therefore, submitted that the evidence of petitioner's opening net worth was insufficient to permit resort to the net worth method. As there was no independent evidence which tended to establish the crime directly the Government failed to prove the amount of defendant's taxable income for the year 1946. Accordingly the judgment should be reversed.

II.

The District Court's Instruction Regarding the Net Worth Method of Proof Was Erroneous.

The *only* instruction given the jury by the District Court on the net worth method of proof was No. 20 appearing at pages 653 and 654 of the transcript:

> "In determining whether defendant Bardin received a net income in excess of that reported in his income tax return for the year 1946 you may consider the facts and circumstances in evidence and view them in relation to each other. In this connection, you may compare the defendant Bardin's net worth of assets at the beginning of the taxable period in question and his net worth of assets over income reported at the end of that period. You may also consider any expenditures of the defendant Bardin, as well as any property acquired by him during the period involved, as shown by the evidence."

This instruction was a misstatement of the net worth method. It permitted the jury to infer unreported taxable income from the bare circumstance that petitioner's net worth at the end of 1946 exceeded income reported by him for that year.

Of course that is not the theory of the net worth method. Rather, it proceeds on the assumption that, the difference between opening net worth and closing net worth, plus nondeductible expenditures, equals taxable income. When this sum is arrived at reported income is substracted therefrom to arrive at unreported income for the period in question. *Holland* v. *United States*, 348 U.S. 121, 125.

As this was the only instruction given by the District Court on the net worth theory it is clear that the Court failed to comply with the rule announced by this Court in the *Holland* case that (348 U.S. 129):

> "Charges should be especially clear, including, in addition to the formal instructions, a summary of the

nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused."

The District Court erred in its instructions. Accordingly, the judgment should be reversed.

III.

The Hypothetical Question Asked the Government's Expert Was Misleading and Not Supported by the Evidence.

At the conclusion of its case the Government asked its accountant, Earl P. Miller, the following hypothetical question, which was duly objected to by petitioner's counsel (Tr. 569):

> "Mr. Miller, assuming that the defendant in this case, Lawrence P. Bardin, had a net cash income for the taxable year 1946, as shown by the income tax return for that year in the sum of $521,883.63 and assuming that he made expenditures in the amount of $831,441.15 in excess of his available declared resources, was taxable income received by the defendant during the year 1946, would there be a tax due and owing the United States by the defendant in defendant's income tax return for the year 1946?"

This question was extremely prejudicial to petitioner. It was couched in terms to imply that the witness' answer resolved the ultimate issue: Did defendant substantially underreport his income for the year 1946? However, the assumption that the witness was asked to make was that petitioner "had a net cash income for the taxable year 1946 as shown by the income tax return for that year in the sum of $521,883.63." If that was petitioner's net cash income for the year 1946 he reported the full amount of his income.

As this hypothetical question implied that the jury could find the defendant guilty even though it found his income

tax return for the year 1946 accurately stated his taxable income, it is submitted that defendant's objection to the question should have been sustained. The failure of the District Court to sustain the objection constituted prejudicial, reversible error. Accordingly, the judgment should be reversed.

IV.

The Court of Appeals Refused to Apply the Decision of This Court in Holland v. United States, 348 U. S. 121 and Companion Cases.

During the course of its decision the Court of Appeals considered the sufficiency of the net worth instructions given by the District Court. However, the Court refused to apply the instruction standards announced by this Court in *Holland* v. *United States,* 348 U.S. 121 and companion cases. Thus the Court of Appeals said (224 F. 2d at 259, n. 3):

> "It seems clear that the language of the *Holland* opinion will be a guide for future trials based on the net worth theory, but it does not indicate that in the cases previously tried, the failure to give a net worth instruction other than given in the *Holland* case and the case at bar requires reversal."

On January 10, 1955, this Court remanded eight net worth cases to respective Courts of Appeals "for consideration in the light of *Holland* v. *United States,* 348 U.S. 121 [and companion cases]." See *Per Curiam Decisions,* 348 U.S. 905.

The refusal of the Court of Appeals to consider petitioner's case in the light of the decisions of this Court in *Holland* and companion cases requires that the judgment of the Court of Appeals be reversed and the case be remanded to that court for proper consideration.

CONCLUSION.

The foregoing demonstrates that while the Government resorted to the net worth method of proof in its prosecution of petitioner, there was insufficient evidence upon which that method could be predicated; the instructions given the jury regarding the method were inadequate and misleading; the hypothetical question asked at the conclusion of the trial was based on a hypothesis establishing petitioner's innocence rather than his guilt. For these reasons the judgment of the Court of Appeals should be reversed and the cause remanded to the District Court for new trial.

In any event the judgment of the Court of Appeals should be reversed and the cause remanded to that court with instructions that it consider petitioner's case in the light of the principles announced in *Holland* v. *United States,* 348 U.S. 121, and companion cases.

Respectfully submitted,

WESLEY G. HALL
PRENTICE H. MARSHALL
Attorneys for Petitioner,
Lawrence P. Bardin

November 22, 1955.

CERTIFICATE.

WESLEY G. HALL certifies that he is a member of the bar of this, the Supreme Court of the United States; that the foregoing petition for rehearing is based upon substantial grounds available to petitioner although not previously presented to this Court; that the foregoing petition for rehearing is presented in good faith and not for the purposes of delay.